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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, ~~1948~~ 1949

No. ~~226~~ 11

**TOM C. CLARK, Attorney General, as Successor to the  
Alien Property Custodian,**

*Petitioner,*

*v.*

**MANUFACTURERS TRUST COMPANY.**

**BRIEF IN OPPOSITION TO PETITION OF TOM C.  
CLARK, ATTORNEY GENERAL, AS SUCCESSOR  
TO THE ALIEN PROPERTY CUSTODIAN FOR  
WRIT OF CERTIORARI.**

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**Statement.**

The Alien Property Custodian, hereinafter referred to as "Custodian", issued a vesting order which described the property thereby vested as a debt owing to Deutsche Reichsbank by Manufacturers Trust Company, hereinafter referred to as "Bank", arising out of a dollar account and any and all rights to demand, enforce and collect same. The vesting order made no determination as to the amount of the debt owing by Bank. It was contended by the Bank that while, at the time of the issuance of the vesting order, the sum of \$25,581.49 stood to the credit of the Reichsbank deposit account on its books, the Bank was not indebted to the Reichsbank by reason of the fact that

the Reichsbank was indebted to the Bank on a matured obligation in excess of said sum. Thereafter, the Attorney General, as Successor to the Custodian, issued a turnover directive wherein he found the sum of \$25,581.49 was owing by the Bank to the Reichsbank without any offset or counterclaim and demanded payment of said sum. Upon the Bank's refusal to pay the said sum, the Attorney General instituted a summary proceeding under Section 17 of the Trading with the Enemy Act.

The District Court for the Southern District of New York made an order directing the Bank to pay the said sum with interest from the date of the turnover directive. An appeal was thereupon taken by the Bank from the said order to the United States Court of Appeals for the Second Circuit. It was contended by the Bank in the proceeding before the District Court and on appeal that the Custodian and the Attorney General, as his successor, had no power to vest a disputed debt until the existence and the amount thereof is judicially determined in a separate proceeding. In the opinion of the Court of Appeals, Swan, *J.* (Clark, *J.*, concurring in that portion of the opinion) stated that if a putative debtor denies the existence of any debt whatever, the Court would hesitate to hold that the Custodian's power extends so far as to make his *ex parte* determination that there is a debt and the amount thereof conclusive in a proceeding under § 17. Nevertheless, it was held that the Bank's assertion of a set-off against the deposit balance admittedly due is in the nature of an independent claim which must be litigated in a proceeding instituted under Section 9 of the Trading with the Enemy Act. The Bank, by separate petition, is now seeking

a writ of certiorari to review that part of the judgment of the Court of Appeals which directed payment of the \$25,581.49.

The majority of the Court of Appeals (Swan and Frank, *JJ.*) held that the Custodian was entitled to interest only from the date of the order made in the proceeding under Section 17 of the Trading with the Enemy Act. The Attorney General seeks a writ of certiorari to review that part of the judgment which modified the order of the District Court by striking out the award of interest.

### POINT I.

**The decision of the Court of Appeals was proper.**

The Court of Appeals disallowed interest upon the ground that the summary procedure provided by Section 17 of the Trading with the Enemy Act enabled the Custodian without delay to obtain an order directing compliance; that the order made in such proceeding will bear interest from the date of its entry; and that the Trading with the Enemy Act contains no provision for interest or any other penalty in the event of non-compliance with the Custodian's demand.

*Billings v. United States*, 232 U. S. 261; *Royal Indemnity Co. v. United States*, 313 U. S. 289; *Maryland Casualty Co. v. United States*, 76 Fed. 2d 626, relied upon by the Attorney General, are not controlling on the question of interest. Those cases dealt with interest on tax payments due to the United States; in other words, fixed obligations due to the United

States. In *Billings v. United States, supra*, it was held that interest is recoverable on taxes which have been illegally withheld because the government is entitled to the immediate use of the money and also because an aggrieved taxpayer who sues to recover the taxes which have been illegally exacted may recover interest from the time of payment to the United States.

If a statute creates an obligation to the United States, interest will be awarded even though the statute is silent with respect to interest if the allowance thereof would be equitable. *Rodgers v. United States*, 332 U. S. 371. It was stated in the aforementioned case, at page 373, that "one for whose financial advantage an obligation was assumed or imposed and who has suffered actual damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained".

The Trading with the Enemy Act did not create an obligation to the United States. It merely imposed a duty upon a person holding property of an enemy to deliver such property upon demand to the Custodian, which property was to be used in accordance with the future determination of the Congress.

At the time of the issuance of the vesting order and of the turnover directive, Congress had not determined what use was to be made of the property. On July 3, 1948 the Trading with the Enemy Act was amended to provide that vested German and Japanese property shall not be returned to its former owners nor compensation be paid to them but that the net proceeds of such property shall be covered into the Treasury, P. L. 896, 80th Congress, Second Session,

July 3, 1948, Par. 12. However, this amendment did not permit the United States to use property to which a claim was made by its own citizens.

Section 9(a) of the Trading with the Enemy Act provides in substance that any person not an enemy or ally of an enemy claiming any interest, right or title in any monies or property delivered or paid to the Custodian or to whom any debt may be owing from an enemy or an ally of an enemy whose property shall have been delivered or paid to the Custodian, may file a claim with the Custodian and that the President may thereupon order the payment, transfer or delivery to said claimant of the monies or property held by the Custodian; if the President shall not order such payment or delivery of the property the claimant may institute a suit in equity to obtain an order directing the payment or delivery of such property to the claimant upon the claimant's establishing of his claimed right, title and interest or debt. It is further provided that upon the institution of such suit the money or property delivered to the Custodian shall be retained until any final judgment or decree entered in favor of the claimant shall be fully satisfied by payment or delivery of the property or until final judgment or decree shall be entered against the claimant or the suit be otherwise terminated.

In the instant case the Bank refused to make the payment of the deposit balance because it asserted a right of setoff against it. The Court of Appeals directed the payment upon the ground that the asserted right of setoff is a cross claim which should be litigated in the proceeding instituted under Section 9 of the Act.



The vesting by the Custodian under the Trading with the Enemy Act is tantamount to confiscation of the property of the enemy but such vesting is not a confiscation of the property rights of citizens. *Houck v. Sutherland*, 271 U. S. 298.

The Attorney General concedes that a proceeding under Section 17 is purely possessory and that it does not determine the ultimate right to retain property (p. 13). If such a proceeding lacks the finality of a determination that a fixed amount of principal is actually owing, there is nothing upon which an award of interest can be predicated.

While on the one hand the Attorney General states that interest should not be awarded as a penalty, on the other hand he urges that interest should be imposed to discourage delay and make unprofitable delay in compliance with the Custodian's demands.

As pointed out by the Court of Appeals, there need not be any delay in full compliance for summary proceedings to compel payment is available to the Custodian under Section 17 of the Act. The Attorney General takes issue with the Court of Appeals' statement that it can obtain an order directing compliance without delay by pointing out that in the instant case seven weeks elapsed between the filing of the Custodian's petition and the entry of the District Court order (p. 12).

It should be noted that the turnover directive was issued on January 27, 1947. The Attorney General did not apply for an order under Section 17 of the Act until October 29, 1947. The motion was heard and decided on November 13, 1947. The Attorney General delayed the entry of the order until December 12, 1947. Any delay was that of the Attorney



General. The Attorney General could have resorted to summary proceedings in January, 1947, and obtained an order within a short time thereafter with the provision for payment of interest from the date thereof.

In any event the award of interest lies within the sound discretion of the Court. Interest should not be awarded for delay in payment found to be due if there is a reasonable ground for such delay. It has been held that even where a statute provides for the awarding of interest where money is "withheld by unreasonable and vexatious delay of payment" interest will not be allowed if the debtor raised a plausible defense. *Adler v. Consumers Co.*, 152 Fed. 2d 696.

## POINT II.

**The petition for writ of certiorari should be denied.**

Respectfully submitted,

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